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THE EVOLUTION OF RULEMAKING AND REVIEW UNDER THE 1981 MODEL STATE ADMINISTRATIVE PROCEDURE ACT: IS THERE A TREND TOWARD NEGOTIATED RULEMAKING?

*By Jylana D. Collins**

Background

Throughout its history, administrative law has existed to enable governmental action.¹ In America, during the earlier part of this century, the trend in governmental action was towards consistently tighter regulation of private business conduct and affairs. The resulting control by state and federal administrative officials of rates, services, and other private practices grew so pervasive and intrusive that resentment grew against the rise of administrative power. The courts developed a doctrine to control this assertion of government intrusion into private liberties which Richard Stewart calls the "traditional model of administrative law." Its purpose is to control "...the competing claims of governmental authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives."²

The "traditional model" rests on several necessary assumptions. First, administrative agencies may act against private individuals pursuant only to direct legislative authority as embodied in rules controlling agency action. Secondly, the decisional processes of the agency must comply with these rules and produce a sufficient record for judicial review in order to ensure the agency's compliance with its legislative directives. To Professor Stewart's thinking, under the traditional model of administrative law the agency was conceived as a mere transmission belt for implementing legislative directives in particular cases.

With the coming of the New Deal, there arose a concept of the administrative agency as a technically expert manager in the public interest. The delegation by the New Deal Congress of sweeping powers to new agencies under a general grant of statutory authority threatened the legitimacy of agency action

* When this essay was prepared, Ms. Collins was a third-year student at the University of San Francisco Law School. The author expresses her gratitude for the assistance rendered by Professor John de J. Pemberton of the USF law faculty in preparing the essay for publication.

1. Maitland, in his Constitutional History of England (1908), defined administrative law as law that "determines the ends and modes to and in which the sovereign powers shall be exercised." Pp. 505-506
2. R. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1669-1676 (1975).

under the "transmission belt" theory of administrative law. Defenders argued that wide discretion was necessary if the agencies were to discharge their planning and managerial functions successfully. Nonetheless, the courts saw a need for control.

The courts controlled the exercise of administrative discretion granted by New Deal legislation in several ways. They began to demand that the substantiality of the evidence supporting agency factfinding be examined more thoroughly and insisted on a wider range of procedural safeguards.³ They required reasoned consistency in agency decisionmaking⁴ and solid justification for departures from established policies, particularly where significant individual expectation interests were involved.⁵ They began to demand a clear statement of legislative purpose when fundamental individual liberties are at risk.⁶ Essentially, the courts required agencies to adhere more scrupulously to the norms of the traditional model. Simultaneously, these developments reduced agencies' power by giving litigating tools to opposing private interests and by providing judges with an additional basis for setting aside decisions.⁷

Today, the exercise of agency discretion is essentially a legislative process of adjusting the competing claims of various private interests affected by agency policy. Courts have asserted that agencies must consider all of the various interests affected by their decisions as a predicate to "balancing all elements essential to a just determination of the public interest."⁸ As Professor Stewart points out, once the function of agencies is conceptualized as adjusting private interests within the relevant fact situation and statute, it is not possible to legitimate agency action by either the "transmission belt" theory of the traditional model or by the "expertise" model of the New Deal period.

3. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) and Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

4. In particular, the agency is bound to follow its own regulations. See, e.g., Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968). However, where an agency has chosen to proceed through case-by-case adjudication, the courts have been far more reluctant to restrain agency flexibility by even minimal standards of decisional consistency. See, e.g., NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267, 292-95 (1974).

5. See NLRB v. Guy F. Atkinsons Co., 195 F.2d 141, 148-50 (9th Cir. 1952).

6. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958). A clear statement of legislative purpose has been demanded by the Court in a variety of contexts to protect important individual interests where the agency had followed questionable procedures or dubious substantive policies. Stewart, *supra*, at 1681.

7. See, e.g., Wong Yang Sung, *supra*, at 46; United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 576-77 (1939); and Morgan v. United States, 304 U.S. 1 (1938).

8. Airline Pilots' Ass'n v. CAB, 475 F.2d 900, 905 (D.C. Cir. 1973). See also Palisades Citizens Ass'n v. CAB, 420 F.2d 188, 191-92 (D.C. Cir. 1969) (CAB must consider the effect of its decisions on "not only its primary interest groups but also the general public at large," for the Board "has been given the scales of public interest. It must effect a balance.")

The traditional model fails because broad legislative directives cannot effectively dictate agency action, and the decision of social and economic policy is thus left to unfettered agency discretion. The "expertise" model — under which discretion was bound by an ascertainable goal, the state of the world, and an applicable technique — is undermined by the current focus on social policy rather than on technical expertise as the foundation for decisionmaking.⁹

Professor Davis¹⁰ observes that, at present, more than 90% of administrative action is probably "informal action," i.e., (1) action taken without trial procedure, (2) discretionary determinations that are mostly or altogether uncontrolled or unguided by announced roles or principles, and (3) lack of judicial review in fact, whether or not the action is theoretically reviewable. Thus, the required balancing of policies in the greater part of administrative governance today is a largely discretionary, ultimately political process, to which the "traditional" and "expertise" models have little applicability.

One of the major abuses which is alleged to result from informal and unreviewable agency discretion is that it allows administrative agencies to become "captured" by the organized interests which they regulate by unduly favoring organized interests at the expense of diffuse and unorganized interests such as consumers, environmentalists, and the poor.¹¹ Other policy decisions most strongly attacked by agency critics are the failure to prosecute vigorously, the working out of agency policy by negotiation with regulated firms, and the quiet settlement of litigation once initiated.¹²

Because these policy decisions take place through informal procedures where traditional controls do not apply, courts have changed the focus of judicial review. By expanding and transforming traditional procedural devices, the court's dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.¹³ One procedural technique developed for this purpose is the "hybridization" of informal rulemaking procedures.

9. Stewart, supra, at 1684.

10. K. Davis, Administrative Law of the Seventies (2nd ed. 1978), Section 1:5 at 14. Professor Davis calls the development of administrative informal action "retarded" and declares that the largest clusters of injustice in the entire legal system are in this 90% area of administrative action where the three above elements come together. 2 Davis, supra, Section 8:1 at 157-158.

11. Industry bias may, in fact, occur because of several reasons. First, because the resources of agency staffs are normally far more limited than industry resources, the information upon which the agency depends to implement its legislative directives comes to a large degree from the groups being regulated. Second, the administrator is largely dependent upon industry cooperation in order to achieve his or her objectives. The administrator will be blamed, however, if the industry suffers serious economic dislocation. For both of these reasons, he or she may pursue conservative policies. Stewart, supra, at 1684-85.

12. Id., at 1685

13. Id., at 1712.

The APA Framework

The APA established three categories of rulemaking procedure: (1) rulemaking with as much or as little party participation as the agency chose, free from statutory limitations, (2) rulemaking in accordance with the basic pattern of notice and written comments, as provided by Section 553, and (3) rulemaking on the record in accordance with Sections 556 and 557. The first category includes interpretative rules and procedural rules, as well as all other rules that are exempt from Section 553 procedures. The second category includes most substantive and legislative rules in furtherance of the major governmental programs. The last category is essentially rulemaking through trial procedure and is very rarely used today.¹⁴

Under Section 554, rulemaking is further divided into formal and informal rulemaking.¹⁵ Although both formal and informal rulemaking are subject to the notice and comment procedures of Section 553(b), under the original understanding of the Act, judicial review is confined exclusively to the record of the administrative hearing preceding formal rulemaking. Although the APA does not limit the class of persons who may seek judicial review to those who participated in the formal rulemaking proceeding, it does make the record of that proceeding the exclusive record for judicial review at the behest of participants and nonparticipants alike. This fact provides a powerful incentive to interested persons to participate in the rulemaking proceeding in order to shape that record.

Under informal rulemaking, the agency uses notice and comment procedures for informational purposes only, and the rules created are subject to collateral attack in enforcement, injunctive, or declaratory proceedings. There is no exclusive rulemaking record; the record for judicial review is compiled in the proceedings collaterally attacking the rule. In theory, informal rulemaking allows an indefinite number of lawsuits relitigating the same factual premises on which the rule is based, a result contrary to efficient administration and at odds with the Overton Park line of cases¹⁶ that insist upon judicial review on an administrative record prepared in informal rulemaking proceedings.

Hybrid Rulemaking

Trial procedures are poorly suited for making rules of general applicability. Adjudication of one case at a time is a cumbersome, expensive, and

14. 1 Davis, supra, Section 6:1, at 450-51.

15. "When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection." 5 U.S.C. Section 553.

16. Camp v. Pitts, 411 U.S. 138, 142 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755-56, 758 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

ineffective method for working out administrative procedure.¹⁷ Thus, the move away from rulemaking on the record has been strong and pervasive. In United States v. Florida East Coast R. Co.,¹⁸ the United States Supreme Court made a most important choice against rulemaking on the record, by holding that the term "hearing," as used in the APA, "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker."¹⁹ The Florida East Coast decision stands for the proposition that a statutory requirement of "hearing" may be satisfied by a procedure of notice and written comments if the statute does not require a determination on the record.²⁰

Following the upsurge of rulemaking in the 1970's and the disinclination to use trial-type procedures to make those rules, a major development occurred concerning Section 553. Courts and legislators gradually moved towards a requirement that an identifiable rulemaking record must be before the agency at the time final rules are issued and that judicial review must be on that record. As Professor Auerbach put it, "(t)here is a strong tendency in recent statutes and judicial decisions to make the Section 553 rulemaking record exclusive in the same sense that a record under Sections 556 and 557 is exclusive, namely (1) the agency must itself base its rule exclusively on that record; (2) the reviewing court must take that record as the exclusive basis on which to inquire into the factual predicates of the rule; (3) no objection to the rule may be considered by the reviewing court if it was not presented during the course of the rulemaking proceeding unless there was reasonable ground for failure to do so; and (4) if the taking of additional evidence is warranted for any reason, the reviewing court may not itself do so (or impose the task upon a master) but must remand to the agency."²¹

However, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. ("Vermont Yankee"),²² the Supreme Court, although reaffirming the requirement that judicial review take place on the administrative record, further prohibited reviewing courts from ordering cross-examination or other trial-type procedures in informal rulemaking proceedings. Implicit in the Vermont Yankee

17. See Corn Products Co. v. FDA, 427 F.2d 511 (3rd Cir.) cert. denied 400 U.S. 957 (1970). The peanut butter proceeding in the Food and Drug Administration began in 1959 and the final rule was issued in 1968, after a transcript of 7,736 pages had been compiled. When the Court finally upheld the rule in 1970, almost everyone who participated in or observed the proceeding believed that trial procedure was inappropriate for deciding whether peanut butter should have 87% or 90% peanuts. 1 Davis, supra, Section 6:39, at 627.

18. 410 U.S. 224 (1973).

19. 410 U.S. 240.

20. 1 Davis, supra, Section 6:39, at 628.

21. Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review, 72 Nw. U.L. Rev. 15 (1977).

22. 435 U.S. 519 (1978).

opinion are two conclusions: (1) procedures of a more judicialized nature than comment procedures are rarely necessary,²³ and (2) when more judicialized procedures are necessary, they can take place in supplementary proceedings incident to judicial review.²⁴ This opinion by the U.S. Supreme Court appears to signify its agreement with other administrative law critics that some of the former simplicity of informal proceedings needs to be restored at the administrative level.

Rulemaking and Review under the 1981 MSAPA.

The Philosophy Behind the Act

Perhaps one of the most salient features of the new MSAPA provisions on rulemaking is its insistence that an agency embody its law and policy in rules rather than by ad hoc order "as soon as feasible and to the extent practicable."²⁵ In the Commissioners' opinion, rules are more available to affected members of the public, they give fairer notice and a better opportunity for public participation in the making of policy than case precedent, and they are more easily understandable and are more effectively monitored by those charged with oversight of agency rules. The Commissioners also display their distrust of agencies by stating that only through enactment of a statute compelling agencies to codify their law and policy in rules will the agencies so comply. "Without such a provision they will

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23. Thus Justice Rehnquist ruled that only when confronted with "extremely compelling circumstances" or "constitutional constraints" should reviewing courts impose procedures on agency rulemaking other than the notice and comment procedures mandated by the APA. *Id.*, at 543. If the administrative record is to be used as the basis for judicial review and if the administrative record is to be a record of notice and comment proceedings, then the assumption must be that notice and comment proceedings are normally adequate to explore factual questions related to rule validity. Gifford, Administrative Rulemaking and Judicial Review: Some Conceptual Models, 65 Minn. L. Rev. 62, 85 (1980).
 24. As employed in the text, the term "supplementary proceedings" includes both those limited classes of remands in which a reviewing court can, consistently with Vermont Yankee, order the employment of additional procedures and those collateral attacks upon rule validity in which, again consistently with Vermont Yankee, a court could order the notice and comment records to be supplemented with additional procedures. Under Vermont Yankee, the courts cannot normally compel an agency to employ procedures in addition to the notice-and-comment procedures mandated in Section 553 and they are to avoid the deleterious effects of Monday morning (procedural) quarterbacking." *Id.*, at 547. Yet the courts can remand in the event of an inadequate record and, when "constitutional constraints" or "exceptionally compelling circumstances" require, they can mandate additional procedures. *Id.*, at 539, 543. The Vermont Yankee mandate, therefore, substantially limits remands in which additional procedures are imposed upon agencies. Gifford, supra, at 85.
 25. 1981 MSAPA Section 2-104(4).

be free, in many situations, to make their most controversial policies on a case-by-case basis in adjudications, and thereby avoid on a permanent basis rulemaking procedures and legislative and gubernatorial review."²⁶

The philosophy behind the rulemaking procedures of the 1981 MSAPA reflect the judicial developments in administrative procedure of the last twenty years. A "rule" under the new model law, is defined as the whole or a part of any agency statement of general applicability that implements, interprets or prescribes law or policy, and includes the amendment or repeal of an existing "rule." If an agency statement fits this definition, it is subject to the requirements of the Act governing rules.²⁷

The Act's rulemaking procedures seek three objectives:²⁸ to facilitate the making of rules that are technically sound, to assure that rulemaking determinations are lawful, and to assure that rulemaking determinations are democratic as well as technocratic. For rules to be technically sound, public input and opinion must be solicited and considered by the agency before adopting rules. The Act, therefore, provides for public access to the rulemaking process through notice and comment procedures preceding the adoption of a rule. Rulemaking determinations are lawful if made within the bounds of the agency's legislative authorization. The creation of an official agency record is required for effective judicial review of the agency's legal authority to make and adopt rules. The Act also requires agencies to review all of their own rules on a periodic and formal basis and to issue a public written report on their review.²⁹ Finally, the Commissioners believe that agencies, as the modus operandi of the legislature, should be subject to similar political pressures. Therefore, not only must agency rules be technically sound and legal, they must also be politically acceptable to the community at large.³⁰ In particular, the Commissioners note the growing trend among legislatures to delegate increasingly broad rulemaking authority to administrative agencies subject only to general, but procedurally-sound, statutory standards.³¹ They, therefore, find the need to provide

26. 1981 MSAPA, Commissioners' Prefatory Note.

27. 1981 MSAPA Section 1-102(10); Bonfield, An Introduction to the 1981 Model State Administrative Procedure Act, Part I, 34 Ad. L. Rev. 1 (1982), at p. 7.

28. 1981 MSAPA Art. III; Sections 3-101 through 3-204.

29. 1981 MSAPA Section 3-201; Bonfield, supra, at 11.

30. 1981 MSAPA Art. III, Commissioners' Preface.

31. 1981 MSAPA Commissioners' Prefatory Note; Art. III, Commissioners' Preface.

political checks on the agency's exercise of that authority throughout the Act.³² What then are these rulemaking procedures which must be implemented in order to codify an agency's law and policy "as soon as feasible and to the extent practicable?"

Rulemaking Procedures

The actual rulemaking procedures of the 1981 MSAPA are analogous but not identical to the APA rulemaking procedures. There are basically two kinds of procedures under the new Model Act: (1) public rulemaking as prescribed by Sections 3-103 through 3-107, and (2) exemptions from public rulemaking procedures. Under the latter category are three kinds of exemptions: general exemptions,³³ interpretative rules,³⁴ and specific exemptions.³⁵

Public Rulemaking Procedures

Under the Act's public rulemaking procedures, the agency may first voluntarily publish a pre-rulemaking notice announcing the subject matter of the possible rule under consideration and indicating where, how and when persons may comment on it.³⁶ Each agency must maintain a public rulemaking docket, indicating all rulemaking currently in process, and all relevant information about those proceedings.³⁷ The agency must publish a notice of proposed rule adoption at least 30 days before the

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32. The Act authorizes private persons to petition agencies for the adoption, amendment, or repeal of a rule. Section 3-117. The governor may veto all or a portion of any agency rule, or terminate any agency rulemaking proceeding, at any time and for any reason. Section 3-202. The legislature may veto an agency rule by the enactment of a statute only. Section 3-204(c). A designated legislative committee may formally object to an agency rule at any time if the reason for the objection is the unlawfulness of the rule. After the objection is published, the agency has the burden of proving the rule's lawfulness. The designated legislative committee may also require the agency to publish the committee's recommendation that the agency hold rulemaking proceedings on whether to adopt, amend or repeal a particular rule. After the publication and proceedings, the agency is not required to take the action recommended by the committee. Section 3-204(e).
33. 1981 MSAPA Section 3-108.
34. 1981 MSAPA Section 3-109.
35. 1981 MSAPA Section 3-116.
36. 1981 MSAPA Section 3-101.
37. 1981 MSAPA Section 3-102; Bonfield, *supra*, at 8.

adoption of the rule³⁸ and afford the public, within that time, the opportunity to submit in writing or by oral proceeding if formally requested, any argument, data and views on the proposed rule.³⁹

The agency must issue a detailed cost-benefit regulatory analysis of a proposed rule if formally requested to do so by the administrative rules review committee, the governor, a political subdivision, an agency or 300 persons signing the request within 20 days after the published notice.⁴⁰ The Commissioners' Comment to this section of the Act cautions against political abuse of this provision by suggesting that states be careful in determining which politically responsible official shall have the statutory authority to invoke a regulatory analysis of a proposed rule. Furthermore, the adequacy of the contents of the required regulatory analysis will not normally be subject to judicial review and a finding that the agency compiled and issued the analysis will support a finding of "good faith" compliance within the meaning of the Act.

Finally, the agency must either adopt or reject the rule within 180 days of the publicized notice or the end of the oral proceedings. Before adopting the rule, the agency must consider all public input received by it concerning the proposed rule, but may use its own expertise and judgement in the adoption of the rule.⁴¹ The agency cannot adopt a rule that is substantially different from the published proposed rule.⁴²

Exemptions from Public Rulemaking Procedures

An agency is generally exempted from following the public rulemaking procedures if it, for good cause, finds that any of the requirements of Section 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule.⁴³ The agency must, however, incorporate into the official record its written reasons for relying on this section and it has the burden of proving the propriety of its decision. Furthermore, any rule issued under this exemption provision automatically expires after 180 days if a designated legislative committee or the governor objects to its issuance. The agency is free, however, to issue the same rule following usual procedures.⁴⁴

38. The notice of proposed rule adoption must include a short explanation of the proposed rule, its specific legal authority, the text of the proposed rule, and where, when and how persons may present their views on the proposed rule and/or demand an oral hearing. 1981 MSAPA Section 3-103(a).

39. 1981 MSAPA Section 3-104. The making of a record is required for oral presentations. Section 3-104(e).

40. 1981 MSAPA Section 3-105.

41. 1981 MSAPA Section 3-106.

42. 1981 MSAPA Section 3-107.

43. 1981 MSAPA Section 3-108.

44. 1981 MSAPA Section 3-108(c).

"Interpretative rules" — rules that only state an agency's understanding of the meaning of the law it enforces — are exempted from required rulemaking procedures under the Act. Upon review, however, the court may determine the validity of the rule wholly anew, if it so desires.⁴⁵

Finally, certain specific categories of rules, such as those having to do solely with the internal management of the agency, are exempted from all rulemaking procedures under the Act. The Commissioners found in each one of these cases, that the extensive rulemaking procedures were either unnecessary, unduly burdensome, or would lead to ineffective or inefficient government. These specifically exempted rules are still subject to the Act's provisions governing public access to agency law and policy, and judicial review of agency action.⁴⁶

Official Agency Rulemaking Record

Except for the specifically exempted rules, each rule adopted by an agency must be accompanied by a concise explanatory statement which contains all of an agency's factual and policy reasons for adopting the rule.⁴⁷ Each agency must maintain an official rulemaking record open to the public for each rule it formally proposes or adopts. This record must contain all written materials submitted and considered by the agency, including any official transcript of required oral proceedings, in connection with that rule.⁴⁸ Ex parte oral communications to the agency during rulemaking are not prohibited by the Act because of their perceived value in informing the agencies of the political acceptability of the agency's rule proposal.⁴⁹

Judicial Review of Agency Rules

The new Model Act provides that unless otherwise provided by law, the agency rulemaking record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.⁵⁰ In proceedings in which the validity of a rule is at issue, however, the agency is limited to the particular reasons of fact, law or policy for its adoption of the rule stated in the concise explanatory statement.⁵¹ Even so, it may supplement the agency rulemaking on judicial review with further evidence and argument to justify or to demonstrate the propriety of those particular reasons.

45. 1981 MSAPA Section 3-109; Bonfield, supra, at 9.

46. 1981 MSAPA Section 3-116; Bonfield, supra, at 11.

47. 1981 MSAPA Section 3-110. This is in addition to the required contents and form of a rule including a statement of purpose and the specific legal authority for its adoption. Section 3-111.

48. 1981 MSAPA Section 3-112.

49. Bonfield, supra, at 9-10.

50. 1981 MSAPA Section 3-112(c).

51. 1981 MSAPA Section 3-110(b).

Nor does a petitioner for judicial review of a rule need to have participated in the rulemaking proceeding on which the rule is based⁵² If the person is subject to that rule, is eligible for standing under another provision of law, or is "otherwise aggrieved or adversely affected by the agency action."⁵³ Furthermore, a petition for review of a rule may be filed at any time⁵⁴ and a court may relieve the petitioner of the exhaustion of remedies requirement if it can be shown that the administrative remedies are inadequate or that requiring exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.⁵⁵ Therefore, a petitioner need not be bound by the agency rulemaking record as the only basis for judicial review because it is not the exclusive record for such purpose and because the standing and exhaustion of remedies requirements for judicial review of agency rulemaking are relaxed.

To briefly conclude, the 1981 MSAPA provisions reflect the evolution of agency rulemaking procedures away from trial-type procedures or purely informal and unreviewable agency rulemaking towards a comfortable position in the middle of the road. All agency rulemaking procedures under the new Model Act are truly hybridized "on the record" rulemaking procedures subject to judicial review of the agency rulemaking record. Interpretative rules are subject to judicial review "de novo" without regard to the agency record, if the court so wishes. The generally and specifically exempted rules are not subject to the normal public rule-making procedures; therefore, public input and the agency's digestion of that input need not be included in their agency records. However, all rules under the Act have some form of record for review which must contain a concise explanatory statement of reasons for its adoption by the agency. This record is not the exclusive basis for judicial review of that rule, but if the validity of the rule is attacked, the agency may offer only those reasons contained in this statement to support the rule upon judicial review. The agency may, however, supplement the agency rulemaking record to demonstrate the propriety of these reasons. In essence, the 1981 MSAPA rulemaking and judicial review structure appears entirely consistent with the U.S. Supreme Court's decisions in the Overton Park and the Vermont Yankee cases.

Criticism Of On The Record Hybrid Rulemaking

Exclusive on the record rulemaking possesses the advantage of resolving at one time all of the claims of various interest groups concerned with the substance of a proposed rule. However, the concept of on the record proceedings

52. 1981 MSAPA Section 5-107.

53. 1981 MSAPA Section 5-106.

54. 1981 MSAPA Section 5-108.

55. Levinson, An Introduction To The 1981 Model State Administrative Procedure Act, Part II, 34 Admin. L. Rev. No. 1, 13, 23 (1982). 1981 MSAPA Section 5-107.

destroys the relative simplicity, flexibility and efficiency once associated with informal rulemaking. Professor Auerbach, for example, believes that this change in judicial review in the last decade has profoundly and adversely affected the rulemaking process on the administrative level. Auerbach suggests that requiring an agency to prepare a defense to all potential challengers of a proposed rule, regardless of the actual number or content of the challenges, plus the fact that only a small percentage of any agency's rules become subject to judicial review, imposes unnecessary costs and delays upon rulemaking, and places additional burdens on courts that must cope with the voluminous and incoherent records generated by such procedures.⁵⁶

The 1981 MSAPA appears to have circumvented this difficulty somewhat by not requiring judicial review to be exclusively on the basis of the rulemaking record. However, there is still considerable pressure placed on the agency to assemble its entire justification for its rule on the official record. It is an open question whether the Commissioners' concern, (i.e., that, otherwise, agencies will lie and make up reasons to support their earlier actions), is unfair to agencies. Good reasons for making a particular rule may appear after the validity of the rule has been attacked. It is not necessarily unethical to grant an agency the same freedom to be creative in supporting its position as is granted its opponents in judicial review of that rule. Given the latitude of political checks on the agency's rulemaking activities provided by the Act, through the governor, legislature, administrative rules review committees,⁵⁷ and even private citizens if the legislature so decides, it is questionable whether agencies must be additionally restricted upon judicial review of the rule's validity by being able to offer only those reasons given in the concise explanatory statement at the time of the rule's adoption.

Opinions as to whether the hybridization of rulemaking procedures has been good or bad for the administrative regulatory system is varied and contradictory. Kenneth Culp Davis calls the renovation of administrative rulemaking "one of the greatest inventions of modern government" and argues for even more control of agency rulemaking.⁵⁸ A zealous critic of informal discretionary rulemaking, Davis states that administrative law is retarded with respect to all of the 90% of administrative action that is informal. In his view, most of the injustice in this area pertains to inadequate control of discretion. Although Davis sees great inroads toward reform being made by the current judicial trend of requiring fact finding on the record for all rulemaking procedures, he states that the strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions

56. Auerbach, supra, at 60-61.

57. 1981 MSAPA Section 3-203 through 3-204.

58. 1 Davis, supra, Section 6:1, at 448.

necessarily depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant.⁵⁹

The guiding principle behind Davis' system of rulemaking procedures is that unnecessary discretionary power should be cut back and necessary discretionary power should be properly confined, structured and checked. The main way to structure discretion is through stating findings and reasons and following precedents. Davis thinks that when findings, reasons and precedents are open to the public, including present and potential parties, the agency's discretion may be largely controlled by the pressure for establishing a system and adhering to it. The way to confine discretionary power through rulemaking is accomplished through statutory enactments, through administrative rules, and by other means.⁶⁰

Clearly, the new Model Act shares Davis' mistrust of agency discretion and desire for more structure and confinement of discretionary power. Nevertheless, a citadel of agency discretionary power remains in the Act: the Act provides that unless otherwise provided by law, the use of informal settlements of controversies that would otherwise end in more formal proceedings is expressly encouraged.⁶¹ This provision, combined with another provision authorizing the agency to convert the informal settlement proceeding into a formal proceeding if appropriate and necessary,⁶² may be the creation of a new concept in agency discretion and rulemaking procedure. To determine how rules could be made through informal settlements under the 1981 MSAPA, let us turn to examine Professor Stewart's model of negotiated rulemaking.

Stewart's Negotiated Rulemaking Model Under the 1981 MSAPA

Although Richard B. Stewart dismisses as too simplistic the popular criticism of administrative law in the 1980's (that the increase in federal regulation coincided and in part caused the decline in U.S. productivity growth during the

59. 2 Davis, *supra*, Section 8:1, at 557-558. Davis cites the U.S. Supreme Court's decision in Morton v. Ruiz (415 U.S. 199, 231-236, 1974) as the fountainhead for new law that limits agency discretion. He states that the four main propositions of the Ruiz opinion are: (1) Power to administer a program necessarily requires the making of rules. Discretion that is exercised without a guiding rule can be held invalid under this proposition. (2) Agency policy is ineffective unless it is embodied in a legislative-type rule. (3) The APA forbids unpublished ad hoc determinations. (4) Determination of eligibility for welfare benefits cannot be made on an ad hoc basis. All in all, Davis applauds the trend in judicial decisions that force agencies to "confine and control" discretion and to "articulate the standards and principles that govern their discretionary decisions." 2 Davis, *supra*, Section 8:3, at 162, citing Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

60. 2 Davis, *supra*, Section 8:4, at 167-169.

61. 1981 MSAPA Section 1-106.

62. 1981 MSAPA Section 1-107.

1970's),⁶³ he does think that regulation has had an adverse effect on investment in new plants and products which in turn cripples the growth of social and market innovation that our society desperately needs. In discussing the impact of regulation on innovation from an administrative law perspective, Stewart focuses on environmental, health and safety regulation.⁶⁴

In Stewart's opinion, the current regulatory system relies heavily on formal, lawyer-dominated procedures for decisions by regulatory administrative agencies and on court litigation to review the decisions of those agencies. The use of these procedures is closely tied to the "command and control" ideology⁶⁵ which involves government coercion and requires administrators continuously to decide disputed engineering, cost, and scientific issues. This system invites formal procedures and judicial review to control agency discretion.

The current approach to judicial review which requires an extensive record containing all data and analysis bearing on the agency's decision, has led to the creation of "paper hearing" procedures that generate a record to serve as the exclusive basis of agency decision and judicial review. Paper hearing requirements, in Stewart's opinion, have formalized rulemaking, increased the time and resources required for decision, and given outside parties procedural weapons that can be used to obstruct or delay agency action.⁶⁶ Congress and the courts also receive Stewart's condemnation for their attempts to limit agency discretion: Congress,

63. The available evidence indicates that factors other than regulation, including macroeconomic policy, changing work force composition, and energy prices have been the major causes of productivity lag. Stewart, Regulation, Innovation, and Administration Law: A Conceptual Framework, 69 Calif. L. Rev. No. 5, 1256, 1260 (1981).

64. Characterizing the drawbacks of our regulatory system as consisting of compliance costs, technical constraints that foreclose innovation opportunities, and of delay and uncertainty associated with determining regulatory requirements, Stewart concludes that Congress and administrators have displayed little concern with the impact of regulation on market innovation. Instead, they have emphasized enforceability, uniformity, and avoidance of disruption. *Id.*, at 1264. Mr. Stewart concludes that while productivity problems do not justify abandoning environmental, health and safety goals, he finds that existing regulatory tools must be modified or replaced in order to reduce adverse impacts on market innovation and to provide incentives for social innovation. *Id.*, at 1261.

65. Stewart finds that our present system of administrative remedies relies almost exclusively on "command and control" measures that require or proscribe specific conduct by regulated firms. *Id.*, at 1264.

66. *Id.*, at 1275.

by adopting more detailed statutory provisions and imposing specific deadlines for implementing regulatory programs, thereby multiplying the grounds and occasions for judicial review, and courts, by tightening traditional standards of review through a "hard look" approach.⁶⁷ These steps to restrict and control administrative discretion, in Stewart's opinion, deprive agencies of the wide discretion and initiative to plan, implement, and revise measures to realize basic social goals under changing circumstances.⁶⁸

Stewart believes that reliance on informal negotiation and bargaining by regulatory agencies, industry, and public interest groups to establish and implement regulatory policy has several advantages over the current system of formal proceedings. These advantages include reduced decisional costs, uncertainty, and delay, and fewer unnecessary or unjustified technical constraints and compliance burdens.

The 1981 MSAPA requires that each agency establish, by rule, specific procedures to facilitate informal settlements of matters, thus assuring that everyone is on notice as to the availability and utility of such procedures.⁶⁹ Using Stewart's negotiated rulemaking approach pursuant to the 1981 MSAPA provisions, the agency would publish a notice concerning the proposed rule in a widely disseminated administration bulletin describing the purpose of the rule, the specific legal authority of the agency to issue it, and its full text.⁷⁰ Analogous to the Act's provision on pre-hearing conferences for adjudication of orders,⁷¹ the notice should contain a statement that the proceeding may, at any time during the informal negotiation conference, be converted into a formal rulemaking procedure if the agency finds that the conversion is appropriate, in the public interest, and no party is substantially prejudiced thereby.⁷² This information would also be placed on the public rulemaking docket.⁷³

The agency would then sponsor an informal process of exchange, negotiation, and consensus among interested parties to develop information, identify alternatives, and promote agreement on issues raised by a proposed agency rulemaking. The agency would retain ultimate authority to take action even if private parties

67. *Id.*, at 1277.

68. *Id.*

69. 1981 MSAPA Section 1-106.

70. 1981 MSAPA Section 3-103.

71. 1981 MSAPA Section 4-204.

72. 1981 MSAPA Section 1-107.

73. 1981 MSAPA Section 3-102.

disagreed; negotiation would not imply mandatory consensus but instead connote a process more informal and open and less dominated by litigation. It would also imply that agencies will enjoy more discretion and power.

Under the present rulemaking procedures, presentation of data and analysis consists of formal submissions written or supervised by lawyers, whose incentives often favor a one-sided presentation of technical and policy issues in order to lay the groundwork for later judicial challenge to an agency action. Stewart believes that if adequate incentives for good-faith discussion can be provided,⁷⁴ the process of negotiated rulemaking should encourage more candid and constructive input from the parties, which in turn could extend the agency's information resources and promote realistic understanding of practical compliance burdens of given proposals. The process could further innovation by promoting the development of less burdensome and restrictive regulations with a sounder technical and operational basis.

The present system often requires several rounds of formal comments or judicial remand for agency reconsideration of an issue that has been inadequately addressed. If a consensus process promotes agreement by all interested parties in the outcome, formal comment procedures could be substantially shortened. Any agreement reached would become an "order" pursuant to the Act's definition of that term⁷⁵ and subject to agency and judicial review. If the participants to the informal process could not agree, the agency could determine the proposed standard and issue the order.⁷⁶

However, as Stewart points out, greater use of informal discussion, negotiation, and consensus is feasible only if the agency and interested parties believe their interests lie in cooperation. Although rulemaking procedures and judicial review must be retained to provide external checks on agency discretion, if any participant sees more gain to be had from adopting extreme positions or from delay or postponement of serious participation until formal proceedings are under way, the process will not work. Parties may participate without good faith in the negotiated standard-setting process, reserving their adversary position for the formal stages

74. The regulatory agency's principal incentive is to expedite the rulemaking process by reducing the length and complexity of formal agency procedures and by avoiding judicial review and remand. Negotiated rulemaking gives regulated firms the incentive to influence the direction of agency rules in favor of approaches that involve less burdensome technical constraints and compliance outlays. Since formal procedures provide leverage for advocacy groups to develop their case and to build a record for judicial review through discovery or cross-examination, there seems to be little incentive for public interest groups to engage in negotiated rulemaking other than the incentive to save money from costly litigation fees. For a fuller discussion, see Stewart, Conceptual Framework, *supra*, at p. 1345.

75. 1981 MSAPA Section 1-102(5).

76. Even in the latter situation, the informal process could help the agency frame a more workable and acceptable standard, diminishing the scope and complexity of the rulemaking proceedings and the likelihood of judicial review. Stewart, Conceptual Framework, *supra*, at 1345

of decisionmaking and using the negotiating stage simply to delay. Alternatively, parties, particularly those with limited resources, may refuse to participate in the negotiation process and save their resources for the formal stages.

In such a case, the agency may have little choice but to abandon the negotiated rulemaking process⁷⁷ and adopt the rule or standard without further comment, thereby waiving usual public rulemaking procedures to the extent they are found "unnecessary, impracticable, or contrary to the public interest."⁷⁸ The agency may also decide to convert the proceeding into a public rulemaking proceeding, announcing the conversion at least 30 days before adoption of the rule and affording the public the usual avenues of comment.

To minimize the danger of those who would exploit the informal negotiation process, Stewart suggests that the following steps be taken: First, the existing "hard look" standard of judicial review should be relaxed where a representative process of negotiated standard setting has yielded a consensus position.⁷⁹ On the other hand, if the process does not yield an agreement, courts should apply the "hard look" approach and associated procedural formalities to ensure effective review of agency decisions. Courts should heavily discount claims that could have been raised during the negotiation stage. These steps would enhance incentives for participation in negotiated standard setting. The agency would gain from consensus, but would be subject to "hard look" review if it failed to secure consensus. Parties would have less opportunity to use formal procedures to delay or influence agency decisions and would have greater incentives to participate in the negotiation stage.

Second, in Stewart's opinion, effective negotiation cannot go on if agency representatives cannot confer informally with some parties to the rulemaking process without including all affected parties. Accordingly, he feels courts and agencies must allow "off the record" communications in the negotiation phase if

77. Whichever rulemaking procedure the agency decides consequently to convert to, the agency may do so only after notice to all parties in the original proceeding. 1981 MSAPA Section 1-107 (b)

78. 1981 MSAPA Section 3-108. See the previous discussion on the general exemption from public rulemaking procedures under the Act on page 15 of this paper.

79. For example, the courts could accept less detailed agency explanations for decisions, including rebuttal of outside parties' criticisms; decline to require successive "rounds" of comment in response to new data or issues; relax requirements that agencies provide a comprehensive "record" of the data and analysis justifying the decision; and forego a detailed examination of the consistency of the agency's decision with such record. Stewart, Conceptual Framework, *supra*, 1348. This dovetails neatly the Model Act's provisions for general exemptions from public rulemaking procedures.

negotiated rulemaking is to succeed.⁸⁰ The Act is cooperative in this respect; it does not prohibit ex parte communications to the agency during rulemaking, nor does it require that all such communications be included on the rulemaking record.⁸¹ Due process objections to non-public deliberations during the negotiating phase should be answered by safeguards that the process is representative and by the Act's requirement that any rule adopted by an agency must be accompanied by a concise explanatory statement containing all of an agency's factual and policy reasons for adopting the rule.⁸²

For purposes of judicial review, the official agency rulemaking record may consist of the agency's concise explanatory statement, plus any on the record oral/written discussion and data that transpired during the negotiations. In the event that the agency converted to a public or non-public rulemaking procedure, the record of the negotiation procedure will be used in the new agency proceeding "to the extent feasible and consistent with the rights of the parties and the requirements of (the) Act."⁸³

Last, to ensure that the process is representative, Stewart suggests that public interest representative groups with limited resources be funded for their participation in the informal negotiation stage. To enable the agency to effectively manage the entire rulemaking process, the agency should disburse the participation subsidies and "enjoy substantial discretion in doing so."⁸⁴ Of course, pursuant to the new Model Act provisions, the agency's reasons for its allocations could be included in its concise explanatory statement accompanying the rule's adoption. While Stewart realizes that agency use of negotiated rulemaking cannot

80. Specifically, Stewart is responding to decisions like those found in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied 434 U.S. 829 (1977) and Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) where the courts discouraged negotiation during rulemaking by forbidding undisclosed off the record communications between interested outside parties once the formal notice and comment period begins.

81. 1981 MSAPA Section 3-112.

82. 1981 MSAPA Section 3-110.

83. 1981 MSAPA Section 1-107(d).

84. Stewart, Conceptual Framework, *supra*, at 1351. The disbursing authority within the agency should not be the prosecuting or operating arm of agency staff, which may prefer groups supporting its position, but a branch (probably the general counsel's office) with a strong interest in avoiding delay and judicial reversal. *Id.*, n. 283, at p. 1351.

be mandated, he thinks that legislation can remove some of the obstacles lying in the path of successful rulemaking by clarifying uncertainties in existing law and by signaling legislative encouragement.⁸⁵

Conclusion

With regard to the formulation of agency rules, Davis and Stewart are nearly diametrically opposed. Stewart generally trusts the specialized experience of the agency staff (or at least he supports the concept that administrators should be experts in the field that they regulate) and regards informal discretion and exchange in rulemaking as essential to the success of the regulatory process. Davis, on the other hand, deplores informal agency discretion in rulemaking. He feels that the exercise of such uncontrolled agency discretion violates due process and allows the agency to subvert the very purpose for which it was legislated to accomplish. It is likely that they are both right.

One characteristic of the field of administrative law is its staggering size. When Stewart argues in support of supplanting the existing rulemaking process with his negotiation process, he draws on the field of health, safety and environmental law to show that the existing rulemaking process simply is not working. When Davis argues the Constitutional right to liberty and property, his examples are drawn from welfare agencies, housing authorities, and agencies that regulate commerce; areas where the formalization of notice and comment rulemaking procedures are working effectively. Whatever the criticism, whatever the commendation, an argument can be made from the vast field of administrative action.

One rulemaking procedure cannot be made to fit all administrative agencies. The 1981 MSAPA attempts to respond to judicial trends and legal criticism that has occurred during the past twenty years, as well as to the need for flexibility in administrative procedure. It reflects its distrust of regulatory agencies by subjecting all agency rulemaking procedures to judicial review on the basis of an agency rulemaking record. At the same time, it restores some of the efficiency associated with informal off the record rulemaking by refusing to make the agency record the exclusive basis for agency and judicial review. Furthermore, under the Act, agencies are given various choices as to which rulemaking procedures to use, accompanied by public monitoring and political checks on such agency discretion.

It is possible that Stewart's negotiation rulemaking model may prove successful within the dictates of the new Model Act. The major obstacle to its success, as Stewart himself admits, is that negotiated rulemaking is ill-suited for the

85. Specifically, such legislation should: (1) Exempt consensus negotiation participants from the Federal Advisory Committee Act or encourage consensus negotiations under the Act, by providing expedited chartering and exemption from public deliberation requirements. (2) Make clear that the Home Box Office prohibition against off-the-record communications does not apply to such negotiations. (3) Authorize agency funding of negotiation for participants with limited resources. (4) Provide that courts take negotiated standard-setting procedures into account by relaxing the scope of review where it has been successfully employed. Id., at 1353.

making of rules involving diverse interests. Consensus may be impossible to reach in that situation. However, Stewart is concerned with survival. He assumes as a practical matter the symbiotic relationship between the administrative agency and big business. He takes for granted that public interest groups always have and always will be under-represented in the rulemaking process, unless their participation is actively solicited and financially supported. What concerns him most is that American productivity is lagging and administrative agencies are failing their legislated goals of protecting the American people from industrial pollution and harm. His answer to these problems is innovation: innovation that makes money sense to industry and innovation that makes life safer, cleaner, and healthier for the American public. Viewed within this context, negotiated rulemaking is a plan worth exploring under the new Model Act.

ANNOUNCEMENT

The Board of Governors of the National Association of Administrative Law Judges is pleased to announce the appointment of Judge Stanley J. Cygan of Illinois to the newly created post of Managing Editor of the Journal. Judge Cygan, long-time Secretary of the Association and counsel to the National Administrative Law Judges Foundation, will address the burgeoning problems of publication and distribution which have accompanied the growth of the Journal.

Judge Cygan will be assisted in his efforts by President-Elect Morgan E. "Pat" Thompson of Oklahoma, who has been named to the post of Associate Editor. Judge Thompson has undertaken to computerize the Journal's mailing list and to improve subscription services.

Judge David J. Agatstein of New York, founding Editor of the Journal and a former President of the Association, has been elevated to the position of Editor-in-Chief. Judge Agatstein will bear overall responsibility for Journal operations, and direct responsibility for Journal content and quality.

Ms. Chris Bini of New York will continue to serve as the Journal's highly-valued Editorial Assistant.

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Association member William Rosenbaum of Augusta, Maine, is preparing a statistical profile of our membership, based upon the information obtained in membership applications (see p. 71). When completed, his report will be made available to interested members.